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COLLEGE OF LAW

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June 11, 2023

Dear Judge:

I am writing this letter on behalf of Daniel Zonas a law student who has applied for a federal clerkship. I had the pleasure of having Daniel as a 1L in Research/Writing & Analysis I, Intro to Brief Writing, and Oral Advocacy classes. Daniel is a diligent and capable student who has consistently shown strong skills in legal research, writing, and analysis. He has a solid understanding of complex legal concepts and has the ability to articulate them effectively in writing. In my legal writing class, Daniel produced well-reasoned legal documents, displaying his knowledge of the law and its practical application.

Apart from his academic achievements, Daniel is motivated to keep learning about the practice of law outside of classes. His resume notes that he has drafted many court documents for practicing attorneys since his 1L year. While I haven't had an opportunity to interact with Daniel since having him in class, I'm happy to see he has continued honing his legal writing and critical thinking skills.

Based on Daniel's academic performance, writing ability, and work ethic, I believe he would be a suitable candidate for a federal clerkship. I have confidence that he possesses the necessary qualities and abilities to fulfill the responsibilities of this role. He will make valuable contributions to any court he has the opportunity to join.

If I may be of further assistance, please do not hesitate to telephone or write me.

Sincerely,

Daniel Nicholson
Associate Professor of Legal Practice
OU College of Law

The UNIVERSITY of OKLAHOMA
College of Law

August 2, 2023

The Honorable James Browning
United States District Court for the District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Re: Daniel Zonas

Dear Judge Browning,

I write to recommend Daniel Zonas for a clerkship with you. Daniel is a strong candidate who has all of the attributes one looks for in a law clerk. I urge you to give his candidacy serious consideration and I encourage you to grant him an interview.

Daniel was a student in my year-long first-year Civil Procedure course. He did well both semesters, earning a B+ in the fall and an A- in the spring. His exam results were consistent with his performance throughout the year. It was evident from his class participation and our out-of-class discussions that he was enjoying the material and picking things up nicely. His performance in and out of class demonstrated that he has a sharp intellect and a strong work ethic.

I can also recommend Daniel based on his personal characteristics. Though he takes his law-school work very seriously, he is quite social with a pleasant and easygoing demeanor. I often saw him hanging out in the student lounge with his classmates, and while the conversations I heard were often about the day's class topics, they were just as often about anything and everything else. In other words, he's a down-to-earth and well-adjusted young man with varied interests who gets along with his peers and who projects as someone who would work very well in a chambers environment.

If you have any questions about Daniel or would like to discuss his candidacy, please don't hesitate to contact me.

Respectfully,
Steven S. Gensler
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Prof. Nicholson | Word Count: 2491 | Daniel Zonas § 3B
Nov. 23, 2021
Memo 2

MEMORANDUM

To: Mary Johnson
From: Daniel Zonas
Re: Our client, Melissa Moreno; Exculpatory Agreement
Date: Nov. 23, 2021

QUESTION PRESENTED

Will the exculpatory agreement signed by Melissa Moreno on behalf of her daughter, Meghan Moreno, bar an ordinary negligence claim against Wild Animal Safari LLC (Safari) under Oklahoma law?

BRIEF ANSWER

Most likely no. Exculpatory contracts require clear and unambiguous language containing the nature and extent of possible damages in order to be valid. Safari's exculpatory contract likely fails in describing the nature of possible damages, as the activity it is supposed to be concerning is unclear. Additionally, an exculpatory agreement must not violate public policy. An exculpatory agreement signed on behalf of a minor waiving her right to sue before she is injured most likely would violate public policy in Oklahoma and be unenforceable.

STATEMENT OF FACTS

Melissa Moreno, our client, and her daughter Meghan signed an exculpatory agreement to allow Meghan, a minor, to participate in a group photo shoot at the Safari location. The agreement contained headings titled, "Waiver of Liability," "Assumption of Risk," "Liability for Associated Costs," and "Waiver of Legal Action." The contract's wording attempted to protect Safari from liability for "the Activity,"

defined as "participation in and spectatorship of events and activities relating to wild animals." Among the company's events listed on its website, there is "Tiger Feeding," which involves "feeding [tigers] chicken drumsticks attached to a pole." This group shoot was a long-standing tradition that involved taking photos of the team standing 10 feet behind a chain-leashed tiger named George. Afterwards, Johnny Strayhorn, the company owner, offered team members an unplanned opportunity to pet George while he licked their hand for a single-person photo shoot, which Meghan participated in. George attacked Meghan during this, causing her significant injury and permanent disfigurement.

DISCUSSION

THE EXCULPATORY AGREEMENT SIGNED BY MORENO ON BEHALF OF HER DAUGHTER WILL MOST LIKELY NOT BAR AN ORDINARY NEGLIGENCE CLAIM AGAINST SAFARI UNDER OKLAHOMA LAW.

Established Oklahoma common law provides that exculpatory agreements, including release forms, are "generally enforceable," but "distasteful to the law." *Schmidt v. U.S.*, 1996 OK 29, ¶ 8, 912 P.2d 871. As such, for an exculpatory agreement to be valid, (1) its "language must evidence a clear and unambiguous intent to exonerate the would-be defendant from liability for the sought-to-be-recovered damages;" (2) "at the time the contract (containing the clause) was executed there must have been no vast difference in bargaining power between the parties;" and (3) "enforcement of these clauses must never (a) be injurious to public health, public morals or confidence in administration of the law or (b) so undermine the security of individual rights vis-à-vis personal safety or private property as to

violate public policy." *Id.* (footnote omitted). Element (1) requires that the contract "describe[s] the nature and extent of damages from which that party seeks to be relieved." *Id.* Additionally, element (2) considers "the importance of the subject matter to the physical or economic well-being of the [agreeing party]" along with its "free choice . . . when seeking reasonable alternatives." *Id.*

There is no evidence to suggest that having a team photo shoot with a tiger was necessary or important to Meghan's wellbeing. In choosing to sign the contract, Melissa and Meghan's decisions were not slanted by any meaningful physical or economic incentive or detriment. As such, element (2) of *Schmidt* is satisfied. Element (1) is questionable because it is unlikely that Moreno had the particular nature of Meghan's injuries in mind when the contract was signed. Additionally, element (3) will most likely remain unsatisfied because it will undermine individual rights by allowing Melissa to release liability on behalf of Meghan.

A. Safari's exculpatory agreement likely did not provide a clear and unambiguous intent to exonerate itself from liability for the sought-to-be-recovered damages.

In order for the exculpatory agreement in question to be valid, it must provide a "clear and unambiguous intent to exonerate the would-be defendant from liability for the sought-to-be-recovered damages . . . ." *Id.* (footnote omitted). This includes a "clear and cogent . . . [description of] the nature and extent of damages from which that party seeks to be relieved." *Id.* ¶ 10. Importantly, "the nature of the wrongful act—for which liability is sought to be imposed—must have been foreseen by, and fall fairly within the contemplation of, the parties." *Id.* (emphasis omitted).

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The court looks at specific text within an exculpatory contract to determine whether it passes the first *Schmidt* element. *Manning v. Brannon*, 1998 OK CIV APP 17, ¶ 7, 956 P.2d 156, 158 (approved for publication by the Oklahoma Supreme Court). In *Manning*, an exculpatory agreement regarding skydiving passed this test. *Id.* ¶ 15.

This agreement contained headings including "RELEASE FROM LIABILITY, COVENANT NOT TO SUE, INDEMNIFICATION AND HOLD HARMLESS, and LIMITATION OF WARRANTY," which were determined to contain sufficient language to prove intent to release the party from liability. *Id.* In addition to this, the nature and extent of possible damages were shown in "ASSUMPTION OF THE RISK." *Id.* ¶ 11. This heading described the extent of damages properly when it included "RISK OF DEATH OR OTHER PERSONAL INJURY." *Id.* The same section also properly described the nature of possible damages when it mentioned "parachuting activities" and included possible causes of harm, such as "equipment malfunction, . . . inadequate training, and deficiencies in the landing area." *Id.*

Safari's exculpatory agreement language indicates that Safari intends to release itself from liability. The terms of this agreement have very similar language to the terms of the agreement in *Manning*. Both agreements share a release of liability, a waiver of legal action, and a liability agreement for associated costs. These sections of Moreno's exculpatory contract are "Waiver of Liability," "Waiver of Legal Action," and "Liability for Associated Costs." Although phrased differently, they serve the same purposes as the terms of the *Manning* agreement. The only

section mentioned whose purpose is not shared by both agreements is the "LIMITATION OF WARRANTY" in the *Manning* contract, which is not relevant to contracts that don't involve equipment.

Safari's exculpatory agreement describes its activities as carrying a "possibility of personal injury, disfigurement, death, . . . and/or loss resulting therefrom." This follows the description of the extent of damages in *Manning* closely and is more than sufficient, considering the actual damages Meghan suffered were personal injury and disfigurement.

However, its description of the nature of damages is likely insufficient. The contract mentions nothing beyond "the participation in and spectatorship of events and activities relating to wild animals." The most lenient possible interpretation of this description is that it covers whatever activity Safari is hosting that the releaser is agreeing to take part in. At the time of the signing of the contract, this activity would have been presumed through long-standing tradition to be taking group photos 10 feet behind a chained, adult tiger. But Johnny offered Meghan the opportunity to get close enough to touch George while taking an individual photo, where the accident took place. None of the activities on the Safari website involved getting this close to a dangerous animal like a tiger. In fact, even the tiger-feeding activity on the website involves feeding a tiger from a pole. While the *Manning* contract is significantly more satisfactory in describing the nature of possible damages, it is still not irreconcilable with Safari's contract. A court could still consider Safari's contract to allow the nature of the damages to "fall fairly within the contemplation" of both parties. With these considerations, it is reasonable to say

the nature of Meghan's damages was likely unforeseen by Moreno when she signed the contract and that Safari's exculpatory agreement violated element (1) of *Schmidt*.

B. Enforcement of Safari's exculpatory agreement would most likely be injurious to public health, morals, or confidence in administration of the law.

For this contract to be valid, it must not "be injurious to public health, public morals, or confidence in administration of the law . . . ." *Schmidt v. U.S.*, 1996 OK 29, ¶ 8, 912 P.2d 871. This element has to do with the enforceability of an exculpatory agreement in relation to the particular activity it concerns. *Combs v. West Siloam Speedway Corp.*, 2017 OK CIV APP 64, ¶ 17, 406 P.3d 1064.

Oklahoma courts generally do not hold an activity to be against public policy because of its risky, non-essential nature. *Manning*, 1998 OK CIV APP 17, ¶ 17, 956 P.2d at 159. In *Manning*, a contract involving release of liability for skydiving was determined to not violate public policy. *Id.* ¶ 17. Similarly, in *Combs*, an individual signed a valid exculpatory agreement that allowed him to spectate from the infield area of a car race. *Combs*, 2017 OK CIV APP 64, ¶ 17, 406 P.3d at 1069.

Moreno signed a contract allegedly allowing Meghan to participate in taking individual photos while a mature tiger is licking her. This activity is non-essential and recreational, like skydiving. As shown in *Combs* and *Manning*, the public is afforded autonomy in waiving rights to make dangerous recreational activities possible. An argument could be made that tiger photos are made unenforceable by

crossing the line of what is too dangerous and non-essential, but there is little to no definitive case law to support this claim.

Because of this, enforcement of this contract most likely would not injure public health, morals, or confidence in administration of the law.

C. Enforcement of Safari's exculpatory agreement would most likely violate public policy by undermining the security of individual rights.

This contract is not valid if it "undermine[s] the security of individual rights vis-à-vis personal safety . . . ." *Schmidt*, 1996 OK 29, ¶ 8. "The contract of a minor may be disaffirmed by the minor himself, either before his majority or within one (1) year's time afterwards . . . ." 15 O.S. § 19 (OSCN 1972). In Oklahoma, "[a]s a matter of public policy, courts have protected minors from improvident and imprudent contractual commitments by declaring the contract of a minor is voidable at the election of the minor after she attains majority." *Wethington v. Swainson*, 155 F.Supp.3d 1173, 1178 (W.D. Okla. 2015).

Oklahoma courts require court approval on post-injury agreements not to sue made on behalf of a minor. *Gomes v. Hameed*, 2008 OK 3, ¶ 1, 184 P.3d 479, 482. In *Gomes*, an oral exculpatory agreement not to sue was allegedly entered on behalf of a minor after she was severely injured from childbirth. *Id.* ¶ 30. The court ruled that an agreement like this one would require court approval before it could effectively waive any "substantial rights." *Id.* The rationale behind this decision was the idea that it is "the duty of the court to guard with jealous care the interests of minors in actions involving their rights." *Id.* ¶ 23. This type of required court

approval could be applied to pre-injury contracts. *Wethington*, 155 F.Supp.3d 1173. In *Wethington*, an exculpatory agreement was signed on behalf of a minor to waive her ability to sue in case of injury caused by the defendant's negligence, which led to a violation of *Schmidt*'s element (3)(b). *Id.* at 1179. Since the court lacked precedent, it had to predict whether *Gomes* would apply to a pre-injury contract. *Id.* at 1178. The court concluded that the Oklahoma Supreme Court would find that "an exculpatory agreement regarding future tortious conduct, signed by parents on behalf of their minor children, is unenforceable." *Id.* at 1179. Since the *Wethington* agreement involves future and not past tortious conduct, it was rendered outright unenforceable against the minor child, allowing her to sue once she attained majority. *Id.* Contrarily, a court might also hold such a contract to be enforceable. *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998). In *Zivich*, a mother signed an exculpatory agreement barring prospective negligence claims on behalf of her minor child, who was then injured at a soccer game hosted by a nonprofit organization. *Id.* According to the court, "public policy supports [such an agreement]." *Id.* at 372. The contract being valid enabled the availability of "affordable recreation." *Id.* If the risk of litigation and substantial damage awards were to be carried by nonprofit organizations and associated volunteers, they "could very well decide that the risks are not worth the effort" and the number of activities made possible through their services would be reduced. *Id.*

If Moreno's case follows *Wethington*, Safari's exculpatory agreement will be rendered invalid under element (3)(b) of *Schmidt*. If so, Meghan will be able to disaffirm her agreement made as a minor and sue Safari once she attains majority. This potential outcome is supported by *Wethington* being almost strictly analogous to *Moreno*'s case. Both cases involve a pre-injury exculpatory contract regarding a dangerous, recreational activity. However, while it can predict how the Oklahoma Supreme Court might rule, it is not mandatory precedent. So, Moreno's question is not immediately resolved from *Wethington*. Still, even though *Wethington* is not mandatory, *Gomes* is. Therefore, the driving rationale in *Wethington* of courts having a duty to "guard . . . the interests of minors in actions involving their rights" is a duty that exists, and will drive the outcome of Moreno's case. An Oklahoma court could possibly affirm the exculpatory clause like the court in *Zivich*. However, the contract in *Zivich* aims to exculpate a nonprofit organization hosting events beneficial to the public, a fact that is used as a significant portion of the rationale in its decision. Safari is not a nonprofit, and its community does not have a similar reason to promote its activities because activities involving wild animals are not as important as affordable youth sports. So, a court would most likely prefer the reasoning in *Wethington* over the reasoning in *Zivich*. Thus, enforcement of Safari's exculpatory agreement would most likely violate public policy by undermining the security of individual rights.

CONCLUSION

The exculpatory agreement signed by Moreno will most likely not bar an

ordinary negligence claim against Safari. For a contract of this kind to be valid, it needs to have clear and unambiguous language, no vast difference in bargaining power, and no violation of public policy. Additionally, minors have the ability to rescind contracts they sign, rendering them invalid.

Safari's exculpatory agreement will likely violate the "clear and unambiguous language rule" because the tiger photo session where Meghan was injured was likely not foreseeable to Moreno when she signed the contract. Minors in Oklahoma have the right to rescind contracts they sign, meaning Meghan's agreement is inconsequential in determining whether she can sue. Using *Wethington* as a predictor, an Oklahoma court would most likely hold Melissa's agreement to be unenforceable and ineffective in waiving her daughter's right to sue. Therefore, Meghan will most likely have the ability to rescind the contract and sue on her own behalf, even if the contract is determined to be valid by *Schmidt*'s "clear and unambiguous" standards.

Professor Nicholson | Word Count: 4993 | Daniel Zonas § 3B
Mar. 14, 2022
Appellate Brief

NO. 22-050

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 2022

JAMIE WHITTEN,

Petitioner,

v.

STATE OF GARNER,

Respondent.

On Writ of Certiorari to the
Garner Supreme Court

BRIEF FOR PETITIONER

Daniel Zonas
Attorney for Petitioner

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Appellate Brief

QUESTION PRESENTED

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." However, some states have passed legislation prohibiting video recording of police officers without all-party consent.

The state of Garner passed an anti-surreptitious recording law prohibiting the creation of any sort of recording containing any conversation without all-party consent or prior warning. After recording her own arrest during a rowdy protest and subsequent interactions with her arresting officers, Whitten was charged with violating the statute.

Did this application of the Garner statute violate Whitten's First Amendment rights?

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OPINIONS BELOW

The opinion of the District Court is unavailable. The opinion of the Supreme Court of Garner is available in the Record. (R. at 2–8.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the First Amendment of the United States Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This case also involves the interpretation and application of Garner Statute title 75, § 52, which prohibits recording any conversation "without the consent of all parties" or otherwise without warning. (R. at 8–9.)

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STATEMENT OF THE CASE

Jamie Whitten attended an animal rights protest at Wild Animal Safari, where there was a large crowd being subdued by law enforcement. (R. at 3–4.) The protest was an open demonstration that took place on private property open to the public. (R. at 6.) While police officers attempted to control the protestors, Whitten began recording the protest on her iPhone. (R. at 4.) She then placed her phone in her pocket while it continued to record. (R. at 4.)

Subsequently, Whitten was arrested on unrelated charges. (R. at 4.) She continued to record as she was being arrested. (R. at 4.) Whitten recorded her conversation with the police officers while in the patrol car. (R. at 4.) Her iPhone continued to record until just before she was placed in her holding cell, where it was confiscated and the recording was terminated by the police. (R. at 4.)

Whitten was charged with violation of Garner's Anti-Surreptitious Recording Privacy Law for filming her arrest and later conversation with the police in the patrol car. (R. at 5.)

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Supreme Court of Garner and remand this case for further proceedings. The Fourteenth Circuit is made an outlier among precedent from other circuits from this decision, and the Supreme Court of Garner caused an artificial circuit split to turn into a real circuit split. Other circuits have held that one has a First Amendment right to record police officers

performing their duties in public spaces, and Whitten's case falls within these boundaries.

The Garner statute limits recording rights, which infringes upon First Amendment rights. The statute prohibits the recording of conversations without consent. The recordings created through this activity are categorically different from any other sort of recordings. Since the statute's goal of privacy cannot be justified without reference to this type of content, the Garner statute is content-based and should be analyzed under strict scrutiny.

Even if this Court must apply intermediate scrutiny, the Garner statute is still unconstitutional as applied to Whitten. Under intermediate scrutiny, protecting police privacy as individuals undermines the right of the public to receive information about government activity. As such, the government interest in the Garner statute is not substantial and cannot be justified under intermediate scrutiny.

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ARGUMENT AND AUTHORITIES

THE GARNER ANTI-SURREPTITIOUS RECORDING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO JAMIE WHITTEN.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The right to freedom of speech listed in the First Amendment to the U.S. Constitution is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). The state of Garner's Anti-Surreptitious Recording Privacy Law is competing with the right to free speech in this case. (R. at 8.) The state of Garner passed this statute under its authority to protect a person's general right to privacy, a privilege granted to the states. *Katz v. United States*, 389 U.S. 347, 350–51 (1967). This regulation prohibits recording a conversation surreptitiously or otherwise without consent or prior warning. (R. at 8–9.) The regulation leaves an exception for verified journalists, who are granted authority to film interactions between police officers and citizens by being immune to the Garner statute. (R. at 9.)

The Garner statute burdens First Amendment rights, as the right to free speech encapsulates free sharing of information, which entails the right to create such information. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). Furthermore, the state of Garner's purpose in enacting this legislation is to regulate specific content, conduct that warrants analysis under strict constitutional scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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This Court should reverse the Garner Supreme Court's ruling and find the Garner statute unconstitutional as applied to Whitten. Applying the Garner statute to individuals recording police officers performing their duties on public property and private property open to the public violates fundamental rights of individuals granted under the First Amendment. These rights are substantial enough to render the Garner statute unjustifiable.

This case involves a constitutional inquiry and is therefore reviewed de novo. U.S. Const. art. III, § 3; *see also Marbury v. Madison*, 5 U.S. 137 (1803).

A. The Garner statute should be analyzed under strict scrutiny.

1. The Garner statute restricts First Amendment rights.

The First Amendment of the Constitution of the United States holds, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This extends beyond the right to share information and includes the right to create such information, like an audiovisual recording. *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012). The right to free speech "would be insecure, or largely ineffective, if the antecedent act of *making* [a] recording is wholly unprotected . . . ." *Id*. Agreement is "practically universal" that a primary purpose of the First Amendment is to protect "free discussion of government affairs." *Id*. at 597. The government may not overstep the First Amendment protection of the free sharing of information by simply regulating the means by which such information is gathered. *Id*. Protecting a video under the

First Amendment but not the creation of that video "defies common sense." *Wadsen*, 878 F.3d at 1203.

The Garner statute prohibits audio and/or video recordings of conversations without all-party consent. Whitten was charged with violating this statute in relation to the recording she produced in the police car. Plainly, this statute prohibits the creation of certain audiovisual recordings, behavior that is protected by the First Amendment. So, the Garner statute restricted Whitten's First Amendment rights.

2. The Garner statute is a content-based restriction, and should be subject to strict scrutiny.

Statutes that burden constitutional rights are unconstitutional unless they are able to survive an applicable level of scrutiny. *Alvarez*, 679 F.3d at 601–02. Freedom of expression is "subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). These restrictions are valid if they are content-neutral and meet an intermediate scrutiny standard. *Id*. Contrarily, content-based restrictions must meet the standard of strict scrutiny. *Alvarez*, 679 F.3d at 603. Content-neutrality depends on the purpose of the regulation in question. *Id*. "Regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). If a regulation's purpose is unrelated to the content of expression, it's content-neutral. *Ward*, 491 U.S. at 791. This holds true even if "it has an incidental effect on some

speakers or messages but not others." *Id*. Thus, "[t]he government's purpose is the controlling consideration." *Id*. A law is content-based if it was enacted "because of disagreement with the message [speech] conveys." *Id*. Importantly, a "facially content-neutral" law can be content-based if it "cannot be "'justified without reference to the content of the regulated speech . . . .'"" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791).

The Garner statute distinguishes and prohibits some types of content. It disallows recordings made secretly, and allows recordings made with consent or a warning. Secret recordings are different in content from recordings made with consent. Individuals who know they are being recorded act differently than if they are being recorded secretly, entailing different recordings being made. Crucially, if both secret and permissive recordings were to share the same content, there would be no purpose served in banning one of them but not the other. So, the Garner statute necessarily categorically bans some types of content.

The fact that the Garner statute bans some types of content and not others does not entail that it's content-based. Instead, one must look to the government's purpose to determine whether the statute is content-based. The government's purpose in the Garner statute can be found in its name, "Anti-Surreptitious Recording Privacy Law." (R. at 8.) Clearly, the regulation was put in place for the sake of individual privacy. However, what is also present in the statute title is the means by which the state attempts to achieve this end, "Anti-Surreptitious

Recording." So, the goal of the statute is individual privacy, and the means is the prohibition of secret recordings.

A surreptitiously recorded video may have no definitive signs that it was recorded without consent. However, it remains unique content enabled by one's ability to record without consent. Such a recording would not exist without an ability to create it. Furthermore, once it does exist, the government cannot distinguish content that was secretly recorded from content that was recorded with consent even though they are separate types of content, one of which the government has an interest in prohibiting.

It's important to understand that the means are intimately tied to the ends of the Garner statute. The statute cannot be construed without regulating specific content. In fact, the only reason the statute is effective is because it regulates expression based on the substance of that expression's content. According to *Turner*, the purpose of intermediate scrutiny being applied to content-neutral regulations is because they don't pose as much risk in eliminating certain viewpoints. However, the Garner statute is wholly founded on which content the government deems appropriate.

Content that is obtained surreptitiously is not regulated because of the means through which it was obtained. Instead, it's regulated because of government disapproval of the content itself. The regulation of surreptitiously gathered content is not incidental, but the integral and primary goal of the statute. The goal of privacy in this statute's context cannot be justified without reference to its means,

which consists of content discrimination and regulation. As such, in congruence with the standard in *Reed*, the Garner statute is content-based and should be subject to strict scrutiny.

B. The Garner statute survives neither intermediate nor strict scrutiny as applied to Jamie Whitten and is therefore unconstitutional.

In order to survive strict scrutiny, a law must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Wadsen*, 878 F.3d at 1204. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a substantial government interest." *Ward*, 491 U.S. at 789. If a law fails an intermediate scrutiny test, it will also fail a strict scrutiny test. *Alvarez*, 679 F.3d at 604. However, if a law does not fail an intermediate scrutiny test, it may still fail a strict scrutiny test. *Id.*

Although strict scrutiny should apply to this case, the Petitioner recognizes the possibility that this Court may not accept its argument for strict scrutiny. Even if intermediate scrutiny should apply, however, the Garner statute does not survive and is unconstitutional as applied to Whitten. Strict scrutiny is a heightened form of intermediate scrutiny, maintaining the same elements and relationship between them. Therefore, the following argument will be tailored to the less constitutionally demanding standard of intermediate scrutiny, but remains unchanged in substance if strict scrutiny is determined to be the applicable standard.

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1. Individuals have a right to record police officers performing their duties in public spaces.

The driving force behind the right to record police officers performing their duties is the interest the public has in the "free discussion of government affairs." Gregory T. Frohman, Comment, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action*, 64 Case W. Res. L. Rev. 1897, 1908 (2014). There is a significant "role of police recordings in exposing police conduct to the public." *Id.* at 1903. This interest is substantial, and a muscle that is used to "distinguish a free nation from a police state." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). Distinctly, "a person's general right to privacy" is "left largely to the law of the individual states." *Katz*, 389 U.S. at 350–51.

Numerous circuits have recognized a right to record police officers performing their duties in public spaces. Gregory T. Frohman, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action* 1897, 1940 (2014). In fact, on this question, there only exists an "artificial circuit split," where some courts affirm the right exists and others dodge the question by instead dealing with qualified immunity and whether the right is "clearly established." *Id.* This strategy stems from the decision in *Pearson v. Callahan*, where the Supreme Court vested discretion in district and circuit court judges to decide which prong of qualified immunity should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). These prongs are, (1) whether there is a violation of a constitutional right, and (2) whether that right was clearly

established at the time. *Id*. If a court chooses to tackle prong (2) and finds that a constitutional right is not clearly established, its analysis could end there. *Id*. In fact, because of this allowance, no courts have specifically denied the existence of the right to surreptitiously record police officers performing their duties. Frohman, *supra* at 1940.

In *Shevin v. Sunbeam Television Corp.*, a Florida wiretapping statue's constitutionality was challenged. *Shevin v. Sunbeam Television Corp*., 351 So. 2d 723, 725 (Fla. 1977). Sunbeam Television Corp., a news company, claimed that "secret recordings" prohibited by the statute had value to the public in that they assured accuracy of recordings made. *Id*. However, the court found the statute to be constitutional, holding that "hidden mechanical contrivances are not indispensable tools of news gathering." *Id*. at 727. Some cases have established an affirmative right to secretly record police officers performing their duties. *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017). In *Fields v. City of Philadelphia*, two individuals, one of which was arrested, brought suit against the city for retaliation against their recording of police officers performing duties on a public sidewalk and at a convention center, respectively. *Id*. at 356. *Fields* affirmed the individuals had a First Amendment right to carry this out, citing the importance of accessing "information regarding public police activity." *Id*. at 359. Furthermore, in *Glik*, an individual was arrested after videotaping police officers carrying out another individual's arrest in a park. *Glik*, 655 F.3d at 79. The court found through an unabridged qualified immunity analysis that this person had a First Amendment

right to film the arrest because it was a "matter of public interest" and was carried out in a public space. *Id.* at 84.

In addition to citing a "right to record matters of public interest," the court noted that "news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 83–84. The latter point was supported by the idea that one's right to access information is "coextensive" with that of the press, and a contemporary news story is "just as likely" to be produced by an individual as an actual reporter. *Id.* Additionally, in *Smith v. City of Cumming*, an individual was prevented from taking a video of police actions in violation of his First Amendment rights. *Smith v. City of Cumming*, 212 F.3d 1332, 1332 (11th Cir. 2000). The court determined that the individual did in fact have this right to film, and nothing that the "press generally has no right to information superior to that of the general public." *Id.* at 1333.

The court in *Shevin* did not err in its ruling, and presents no impediment to Whitten's case. *Shevin* is similar to the instant case in that it involves a wiretapping statute prohibiting a type of recording that is valuable to the public. However, the major difference is that the challenge to the Florida wiretapping statute makes no reference to recording police officers. This fact is what sets *Shevin* apart from Whitten's case and prevents it from contributing to the circuit split on this issue.

The case at hand is much more similar in nature to *Fields* and *Glik*, which involve the videotaping of police officers. A rationale frequently cited in these types

of cases includes informing the public of police activity and newsgathering for dissemination of government affairs. This rationale is not mentioned in *Shevin*. The available cases addressing whether one has a First Amendment right to record police officers while performing their public duties show a clear trend in the affirmative. The public has an undeniable right to monitor the proper fulfillment of police duties, which should be subject to only reasonable restrictions. This is the integral component of Whitten's case that sets her aside from other newsgatherers such as the one in *Shevin*.

One might argue that the Garner statute overcomes the need to afford the public this right to record by granting special privileges to "verified journalists." (R. at 9.) However, this does not stop the statute from violating essential public First Amendment rights. This Court should follow precedent from *Glik* and *Smith* on this issue. While such an exception allows a pathway for exposure of police conduct, *Glik* makes a relevant note that this right is shared by all of the public, and cannot be limited to just reporters. Contemporary technology standards don't make reporters obsolete, but they do influence the scope of people able to gather information. When that information is of particular First-Amendment-protected public interest, government limitation is unconstitutional. In a society with protected free speech, it is important to ensure every person has a right to access information, without qualifications and restrictions.

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The government's interest in individual privacy is not compelling enough to overcome the individual First Amendment right to record police officers performing their duties in public.

2. The right to record police officers performing their duties includes private property that acts as a public space in addition to public property.

The reasoning in *Glik* is limited to "public" spaces. *Glik*, 655 F.3d at 84. The recording in *Glik* took place in a public park. *Id.* at 79. However, in *Gericke v. Begin*, an individual was arrested for filming another individual's traffic stop. *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014). The court cited *Glik* in affirming the individual's right to film, saying that the activity was "carried out in public." *Id.* at 7. *Project Veritas Action Fund v. Rollins*, another First Circuit case, acknowledged a lack of clarity in this standard. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 827 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560, 211 (2021). This court consolidated *Glik* and *Gericke*, saying their settings encompass "inescapably public spaces" like "traffic stops" and "public parks," but neither case confirmed nor denied the capacity of a "publicly accessible private property" to count as a "public space." *Id.* In *Fordyce v. City of Seattle*, an individual was arrested after filming police officers and their interactions with a crowd at a protest. *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995). After his charges were dismissed, he brought an action against the city for violation of his first amendment rights. *Id.* The court in this case ruled the plaintiff had a "First Amendment right to film matters of public interest." *Id.* at 439.

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Glik and *Gericke* have both affirmed a right to record in "public." This is useful because it effectively includes public property, which was the setting for both cases. Part of Whitten's charges include her recordings made on public property, in the back of a police car. This setting qualifies as a public space that is "inescapably" public, as it matches up to the *Rollins* standard closely. The interior of a moving police car is hardly different from the traffic stop in *Gericke*. Both take place on public property, and can be viewed by anyone on the street. Thanks to elaboration on the public area constraint from *Gericke*, Whitten's recording inside a publicly-owned police car is very closely analogous to the car in *Gericke* and requires almost no speculation as to whether this location is included in *Glik*. Therefore, Whitten's filming inside a publicly-owned police car is included in the rights affirmed in *Glik*.

However, these cases have not elaborated on whether this includes privately-owned property that acts as a public forum, like the site of Whitten's protest. Whitten's public protest took place at Wild Animal Safari, and included over twenty individuals. (R. at 3–4.)

The analysis in determining whether police should be free from recordings on private property is a determination of what, if anything, has changed in the transfer of setting from public to private property. In other words, the question is whether police officers should have more of a right to privacy, and whether the public has any less of an interest in observing their behavior.

Individuals are only afforded the right to record police officers while they are performing their duties. Just as this public interest no longer exists while their

duties are not being performed, it exists perpetually as long as police duties are being performed. The public has no less interest in sharing and discussing government action on private property than on public property.

The protest at Wild Animal Safari utilized private land as a public forum, and was meant to be seen and heard. The setting of *Fordyce* was a protest that took place on public property. Whitten filmed police interactions like the plaintiff in *Fordyce*. There is no practical reason to separate these two cases besides the simple labels of "public" and "private" property. Functionally, Wild Animal Safari's private property acted in the same way as the public property in *Fordyce*. Just as a police officer would not expect his actions to be private in the protest in *Fordyce*, he could not reasonably expect his actions to be private at the Wild Animal Safari protest. Therefore, police expectation of privacy remains unchanged.

One's right to record police performing their duties in public areas is not contingent on whether a location is public or private, but the function of this location. Police officers performing their duties still have trust placed in them, no matter what sort of property they are on. Therefore, the individual right to record police officers performing their duties should extend to private property that acts as a public space.

3. The right to record should not be limited to third-parties.

In *Glik*, in addition to affirming a general right to record police officers performing their duties in public spaces, the court mentioned that this right is subject to "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 84.

The *Glik* court stated that the individual recorded police officers "from a comfortable remove" and didn't "molest them in any way," so his actions satisfied this requirement. *Id*. This standard is shared by *Smith*. *Smith*, 212 F.3d at 1333.

These cases raise potential questions regarding who might be able to record police interactions because they involve third parties filming an arrest, not the actual person being arrested.

The reasonable time, place, and manner restrictions mentioned in *Glik and Smith* indicate that the right to record is also limited in scope to non-intrusive recordings. This is the source of the line "from a comfortable remove" in *Glik*. The purpose of this was not to say police interactions can only be filmed from a "comfortable remove," but that the individual in *Glik* could not have overstepped his constitutional right to record. The ways a person can interfere with an arrest are tremendously limited when that person films from a distance. Filming up-close as a third party presents at least a physical obstacle for police duties. However, this is irrelevant in Whitten's case. Whitten is filming as she is getting arrested. Because the officers did not realize she was recording until she was being searched, Whitten's recording clearly did not interfere with the arrest in any significant way.

The First Amendment right made out in *Glik* and *Smith* was never meant to be exclusively enjoyed by a third-party. Non-intrusiveness, not distance, is the qualifier in these cases, and Whitten falls into this category. A person being arrested has just as much of a right to film police officers performing their duties in

public spaces as anyone else, contingent only upon the time, place, and manner in which the filming is conducted.

CONCLUSION

This Court should reverse the Garner Supreme Court's decision and remand the case for further proceedings. The Garner statute's goal of individual privacy cannot be justified without reference to the category of content it bans. Therefore, it must survive strict scrutiny.

Even if this argument is not accepted, the Garner statute violates Whitten's First Amendment rights and survives neither strict nor intermediate scrutiny. There is a clear pattern in numerous circuits that shows a constitutional right to record police officers performing their duties in public places. Whitten recorded police officers in a reasonable manner, place, and time. This Court should affirm the right established in the First Circuit to preserve free discussion of government affairs.

Respectfully submitted,

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CERTIFICATIONS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief for Petitioner was served on all parties on March 14, 2022, by depositing the briefs in the U.S. Mail, postage prepaid or by personal delivery.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4993 words, including every page except appendices.

Respectfully submitted,

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